No. 13-834C

(Chief Judge Campbell-Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD D. MARTIN, JR., et al.,

Plaintiffs,
v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO TRANSFER AND MOTION TO DISMISS

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DONALD D. MARTIN, JR., et al.,	)	
	)	
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	)	(Chief Judge Campbell-Smith)
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DEFENDANT'S MOTION TO TRANSFER AND MOTION TO DISMISS

Pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims defendant, the United States, respectfully requests that the Court transfer plaintiffs' claims in their first amended complaint, filed on January 27, 2014, alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, to the district courts with jurisdiction because this Court does not possess subject matter jurisdiction to entertain plaintiffs' claims. Counsel for plaintiffs, Heidi Burakiewicz, has indicated that plaintiffs oppose this request.

Assuming the Court will entertain jurisdiction, the United States respectfully requests, pursuant to RCFC 12(b)(6), that the Court dismiss all of the claims plaintiffs have alleged in their first amended complaint for failure to state a claim.

DEFEDANT'S BRIEF

STATEMENT OF THE ISSUES

1. Whether this Court possesses jurisdiction to entertain plaintiffs' claims pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, because that Act imposes monetary liability and has its own judicial remedies and, thus, the Tucker Act, 28 U.S.C. § 1491, is displaced as a source of jurisdiction.

2. Whether plaintiffs' allegations that defendant was delayed in paying members[1] a minimum wage for the days that they worked during the period October 1-5, 2013, does not state a cause of action for a violation of the FLSA.

3. Whether plaintiffs' allegations that defendant was delayed in paying non-exempt members overtime pay for the days that they worked during the period October 1-5, 2013, does not state a cause of action for a violation of the FLSA.

4. Whether plaintiffs have failed to state a cause of action for violation of the FLSA with respect to FLSA exempt employees, because FLSA exempt employees are not subject to the FLSA.

5. Whether, if the Court were to find the defendant violated the FLSA, the Government acted reasonably under the circumstances because the Anti-Deficiency Act prohibited the payment of federal employees who worked during the lapse of appropriations and partial Government shut-down, from October 1, 2013, to October 5, 2013, until after a budget was passed, and, therefore, liquidated damages are not appropriate.

6. Whether plaintiffs have failed to state a cause of action for violation of the Back

[1] Plaintiffs define "members" to be the members of the proposed collective action, including the original five plaintiffs.

Pay Act because they have failed to allege either an unjustified or unwarranted personnel action or a withdrawal or reduction of all or part of their pay.

7. Whether, even if the Court were to find a Back Pay Act violation, plaintiffs cannot recover interest on their "back wages" because they have failed to allege that they were not paid their back wages within 30 days of the alleged withholding of their back wages, as required by the statute and implementing regulations.

STATEMENT OF THE CASE

The original five plaintiffs, Donald Martin, Patricia Manbeck, Jeff Roberts, Jose Rojas, and Randall Sumner, current employees of the United States Department of Justice, Bureau of Prisons working at various Federal prisons throughout the United States, filed their complaint on October 24, 2013, alleging violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, because they were not paid minimum and overtime wages on their scheduled pay day, in October 2013. Complaint ¶1. In their first amended complaint, filed on January 27, 2014, the original plaintiffs were joined by over 1,000 opt-in plaintiffs. First Amended Complaint (AmComp.) at Attachment A. Plaintiffs' FLSA allegations are based upon circumstances surrounding the lapse in Government appropriations which forced a partial Government shut-down, in October, 2013. *Id.* at ¶1.

Plaintiffs allege that they are paid biweekly. AmComp. ¶19. They allege that the Government was delayed in paying them a portion of their wages for Pay Period 19 (September 22, 2013, through October 5, 2013). AmComp. ¶¶20 - 24. Plaintiffs allege that their Scheduled Paydays for Pay Period 19 were October 11, 2013, October 15, 2013, or October 17, 2013. *Id.* at ¶20. Plaintiffs do not allege the date or dates when they were paid for the work that they performed from October 1 through October 5, 2013.

Count One of the amended complaint alleges that defendant failed to pay members a minimum wage on their "scheduled payday" for the days that they worked during the period October 1-5, 2013, when the Government was partially shut-down, in violation of the FLSA. AmComp. ¶¶52-55. They allege that, although they worked during that week (Pay Period 19, according to plaintiffs), their pay for those days was delayed, and they were paid for only six of the ten days in that pay period on their scheduled pay day. Plaintiffs seek "liquidated damages under the FLSA equal to an amount that they should have been paid to satisfy the FLSA's minimum wage requirements on the Scheduled Payday for work performed during the Week." AmComp. at Prayer For Relief, ¶c. There is no dispute that all plaintiffs have now been paid their full wages for the days that they worked during the week of October 1-5, 2013.

Count Two of the amended complaint alleges that defendant failed to pay members classified as FLSA nonexempt their overtime pay on their "scheduled payday," for the days that they worked during the period October 1-5, 2013, when the Government was partially shut-down. AmComp. ¶¶56-60. Plaintiffs allege that defendant violated the overtime provisions of the FLSA with respect to FLSA nonexempt employees. AmComp. ¶¶34-38; 56-60. Some of the members allege that they were not paid for the days that they worked during the period October 1- 5, 2013, for work in excess of the applicable overtime thresholds. AmComp. ¶¶34-47. Plaintiffs allege that, although they worked overtime, from one to five days during that week (Pay Period 19, according to plaintiffs), their pay for that overtime was delayed, and they were paid for only six out of ten days on their scheduled payday. AmComp. ¶34. For FLSA nonexempt members, plaintiffs seek "monetary damages in the form of liquidated damages under the FLSA equal to the amount of overtime compensation that they should have been paid on the Scheduled Payday for work performed during the Week." AmComp. at Prayer For Relief,

¶d. There is no dispute that all plaintiffs have been paid their full wages for the days that they worked during the week of October 1-5, 2013.

Count Three of the amended complaint alleges that defendant failed to pay members classified as FLSA exempt their overtime pay on their "scheduled payday" for the days that they worked overtime during the period October 1-5, 2013, when the Government was partially shut-down. AmComp. ¶¶61-66. Plaintiffs allege, with respect to FLSA exempt employees, that defendant "did not pay FLSA Exempt Plaintiffs and other FLSA Exempt Members on a salary basis on their Scheduled Payday for work during the Week, consistent with their classification as exempt from the FLSA." AmComp. ¶62. Plaintiffs allege that defendant is required to pay FLSA exempt employees for overtime at a rate of one and one-half times their regular rates for work performed during the week in excess of the applicable thresholds. AmComp. ¶¶43-44. For FLSA exempt members, plaintiffs seek "monetary damages equal to the difference between what they were paid for overtime hours worked and one and one-half times their regular rate times the number of overtime hours worked during the Week," plus liquidated damages. AmComp. at Prayer For Relief, ¶e.

Count Four alleges violations of the Back Pay Act, 29 U.S.C. §5596. AmComp. ¶¶67-69. Plaintiffs allege that members suffered an unjustified and unwarranted personnel action when defendant did not pay them a minimum wage and overtime pay on their scheduled payday for the days that they worked during the period October 1-5, 2013, when the Government was partially shut-down. *Id.* If statutory liquidated damages for the alleged violations of the FLSA are not awarded, then plaintiffs assert that they "are entitled to prejudgment interest under the Back Pay Act, 5 U.S.C. §5596, from their Scheduled Payday to the date of judgment for all amounts not paid in violation of the FLSA." AmComp. ¶69.

SUMMARY OF THE ARGUMENT

This Court does not possess jurisdiction to entertain plaintiffs' claims pursuant to the FLSA. The Tucker Act, the only possible source of this Court's jurisdiction in this case, was created to provide a remedy when statutes impose monetary liability upon the United States but do not themselves provide remedies. When a law imposing monetary liability contains its own judicial remedies, however, the Tucker Act does not apply. *United States v. Bormes*, 133 S. Ct. 12 (2012), and cases cited therein.

The FLSA establishes liability, a cause of action, a measure of damages, and an applicable statute of limitations. Moreover, it expressly authorizes judicial review. Because the FLSA provides the accoutrements of a judicial action, the liability that Congress intended to create can be determined from only the text of the FLSA, and the Tucker Act is displaced. As a result, this Court does not possess jurisdiction to entertain plaintiffs' claims.

Moreover, if the Court were to determine that it may entertain jurisdiction of this action, the complaint does not state a claim for a FLSA violation. Plaintiffs allege that, because the Government was delayed in paying them a portion of their wages for Pay Period 19, the Government violated the FLSA and is, therefore, liable to plaintiffs for liquidated damages or prejudgment interest. Plaintiffs, however, can identify no provision in the FLSA or any OPM regulations implementing the Act that requires payment of wages on a particular day. Neither the Act nor the OPM regulations define "timely payment," or "prompt payment," or "payday." There is no Federal regulation that requires that Federal employees must be paid on a particular day or in a particular interval of time. This circuit has never found that a short delay in the payment of wages to Federal employees is a violation of the FLSA. The Act is designed to protect low wage workers who are not paid minimum wage for their work or are not paid at all,

not employees like these plaintiffs whose pay was delayed only a short time. There are no allegations that the Government delayed payment in order to evade the law or retain plainitffs' pay.

Further, even if the Court were to find an FLSA violation, the Court should exercise its discretion and not award liquidated damages. First, there is no dispute that members have been paid the wages that were owed to them for the period of the lapse in appropriations. Upon information and belief, the Government paid plaintiffs quickly after the resolution of the budget impasse. Given that the Anti-Deficiency Act prohibited the Government from paying plaintiffs during the lapse in appropriations, the Government acted reasonably, and no liquidated damages are warranted. Plaintiffs' claims asserting violations of the FLSA should be dismissed for failure to state a claim.

Plaintiffs' claims under the Back Pay Act should be dismissed for failure to state a claim, as well. Plaintiffs have not asserted any facts demonstrating that there was an unjustified or unwarranted personnel action, or that plaintiffs suffered from a withdrawal or reduction in their wages. It is undisputed that plaintiffs and members of the potential collective action have been paid the wages they earned for the work they did during the period October 1-5, 2013. Moreover, there is no provision for interest under the FLSA, and plaintiffs cannot collect interest under the Back Pay Act because they have not alleged that they were paid more than 30 days after their scheduled payday. Count Four should be dismissed for failure to state a claim.

ARGUMENT

DEFENDANT'S MOTION TO TRANSFER

I. Standard Of Review

"Subject matter jurisdiction is a threshold matter that must be determined at the outset of a case." *King v. United States*, 81 Fed. Cl. 766, 768 (2008) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1365 (Fed. Cir. 2007)). When deciding a motion to dismiss based upon lack of subject matter jurisdiction, "the allegations of the complaint must be construed favorably to the plaintiff." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989). Nonetheless, plaintiff bears the burden of establishing jurisdiction. *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). "Determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983)).

The United States is immune from suit unless it has specifically waived sovereign immunity. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed" and "consent to be sued must be construed strictly in favor of the sovereign and not enlarge[d] . . . beyond what the language requires." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (citations and internal quotation marks omitted). A waiver of sovereign immunity cannot be implied but must be "unequivocally expressed." *INS v. St. Cyr*, 533 U.S. 289, 299 n.10 (2001).

II. This Court Does Not Possess Jurisdiction To Entertain Plaintiffs' FLSA Claims

Like its predecessor, the United States Court of Claims, this is a court of limited jurisdiction. *United States v. Testan*, 424 U.S. 392, 398-99 (1976); *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969). The central provision granting consent to suit in this Court is the Tucker Act, 28 U.S.C. § 1491. *United States v. Testan*, 424 U.S. at 397; *Aetna Cas. & Sur. Co. v. United States*, 228 Ct. Cl. 146, 151, 655 F.2d 1047, 1051 (1981). In *United States v. Bormes*, 133 S. Ct. 12 (2012), however, the Court confirms that, when a statute imposing monetary liability against the United States contains its own self-executing remedial scheme, the Tucker Act does not apply. Because the FLSA satisfies these criteria, this Court does not possess jurisdiction to entertain plaintiffs' claims.

The Court of Claims was established pursuant to the Act of 1855 in order to provide a judicial forum for certain monetary claims against the United States for which there were no other avenues of judicial enforcement. *See* Act of Feb. 24, 1855 (1855 Act), ch. 122, § 1, 10 Stat. 612 (1855). It was created, in other words, to fill a gap. It was not designed to replace or to provide an alternative to an avenue of judicial enforcement provided in another statute.

Like its predecessors (the Act of 1855 and its successors), the Tucker Act, 28 U.S.C. § 1491, establishes jurisdiction in this Court for actions against the United States for certain monetary claims not otherwise judicially enforceable. "The Tucker Act's jurisdictional grant, and accompanying immunity waiver, supplied the missing ingredient for an action against the United States for the breach of certain monetary obligations not otherwise judicially enforceable." *Bormes*, 133 S. Ct. at 18, n.4. The Tucker Act does not replace or provide an alternative to a judicial remedy established in another statute. When a law imposing monetary

liability on the United States contains its own judicial remedies, the Tucker Act is inapplicable. *Id.*

Bormes was a putative class action against the United States premised upon the Fair Credit Reporting Act (FCRA). Plaintiff sued in the district court for damages under 15 U.S.C. § 1681n(a), and invoked the court's jurisdiction under the jurisdiction provision for FCRA actions, 15 U.S.C. § 1681p, as well as the Little Tucker Act, 28 U.S.C. § 1346(a)(2). The district court dismissed for failure to state a claim, holding that the FCRA did not contain a waiver of sovereign immunity. *Bormes*, 133 S.Ct. at 15. The Little Tucker Act was not addressed. *Id.*

Plaintiff appealed to the United States Court of Appeals for the Federal Circuit based upon that court's jurisdiction under 28 U.S.C. § 1295(a)(2) over appeals from cases in which jurisdiction was based in whole or in part upon the Little Tucker Act. *Id.* at 16. The Government requested to transfer the appeal to the Seventh Circuit, because the Little Tucker Act's jurisdictional grant did not apply to the case. *Id.* The court of appeals denied the transfer motion and vacated the district court's decision, holding that the Little Tucker Act provided the Government's consent to suit for violation of the FCRA. *Id.* The court of appeals reasoned that, because the FCRA could "'fairly be interpreted as mandating compensation by the Federal Government for the damage sustained,'" it fell within the waiver of sovereign immunity contained in the Little Tucker Act. *Bormes v. United States*, 626 F.3d 574, 578 (Fed. Cir. 2010) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)).

The Supreme Court vacated the Federal Circuit's decision. The Court reviewed the history and purpose of the Tucker Act and Little Tucker Act and concluded that the Tucker Act's jurisdictional grant and accompanying immunity waiver were enacted to supply the missing

ingredient for an action against the United States for the breach of certain monetary obligations not otherwise judicially enforceable. The Court further explained:

> The Tucker Act is displaced, however, when a law assertedly imposing monetary liability on the United States contains its own judicial remedies. In that event, the specific remedial scheme establishes the exclusive framework for the liability Congress created under the statute. Because a precisely drawn, detailed statute pre-empts more general remedies, FCRA's self-executing remedial scheme supersedes the gap-filling role of the Tucker Act.

Bormes, 133 S. Ct. at 18 (internal quotation marks and citations omitted). The Court then applied this principle to the case before it:

> FCRA creates a detailed remedial scheme. Its provisions set out a carefully circumscribed, time-limited, plaintiff-specific cause of action, and also precisely define the appropriate forum. It authorizes aggrieved consumers to hold 'any person' who willfully or negligent[ly] fails to comply with the Act's requirements liable for specified damages. Claims to enforce liability must be brought within a specified limitations period, § 1681p, and jurisdiction will lie in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction. Without resort to the Tucker Act, FCRA enables claimants to pursue in court the monetary relief contemplated by the statute.

Id. at 19 (internal quotation marks and citations omitted).

This case involves claims based upon the FLSA, not the FCRA. Like the FCRA, the FLSA establishes a detailed remedial scheme. Both the FCRA and the FLSA authorize liability for specific monetary damages. The FCRA authorizes aggrieved consumers to hold "any person" liable for specified damages, 15 U.S.C. § 1681n. Similarly, the FLSA provides for employees to hold "[a]ny employer" liable for unpaid wages, minimum wage, or overtime wages due to the employee. 29 U.S.C. § 216(b).

Both statutes limit the period during which a suit may be brought. The FCRA requires that claims to enforce liability must be brought within two years of plaintiffs' discovery of the

violation or five years of the date of the violation, 15 U.S.C. § 1681p. The FLSA requires that claims to enforce liability must be brought within two years, except if the violation is willful, in which case the claim must be brought within three years. 29 U.S.C. § 255(a). Both statutes also provide for the payment of attorney fees. 15 U.S.C. § 1681n(a)(3); 29 U.S.C. § 255(a).

Finally, both statutes explicitly authorize a judicial avenue of review. The FCRA provides that suit may be brought in "in any appropriate district court . . . or in any other court of competent jurisdiction." 15 U.S.C. § 1681p. The FLSA provides that suit may be brought "in any Federal or State court of competent jurisdiction." 29 U.S.C. §216 (b). Thus, like the FCRA, the FLSA imposes monetary liability and also contains its own judicial remedies. The reasoning in *Bormes* dictates, therefore, that there is no "gap" for the Tucker Act to fill and that the Tucker Act is unavailable as a source of jurisdiction for FLSA suits.

The Federal Circuit and other circuit courts of appeal have long permitted FLSA suits to be brought against the United States, primarily in this Court, pursuant to the Tucker Act. *See Saraco v. United States*, 61 F.3d 863, 865-66 (Fed. Cir. 1995); *Parker v. King*, 935 F.2d 1174, 1177-78 (11th Cir. 1991); *Zumerling v. Devine*, 769 F.2d 745, 748-49 (Fed. Cir. 1985); *Graham v. Henegar*, 640 F.2d 732, 733-36 (5th Cir. 1981). In *Zumerling*, the court explained:

> 29 U.S.C. § 216(b) authorizes Fair Labor Standards Act suits in any Federal or state court of competent jurisdiction, but the words "of competent jurisdiction" tell us that the words do not stand alone but require one to look elsewhere to find out what court, if any, has jurisdiction.

Zumerling, 769 F.2d at 749 (internal quotation marks and citations omitted). *See also Saraco*, 61 F.3d at 865.

Although the jurisdictional provision of the FLSA, unlike the FCRA, does not specifically name the district court or any other particular court as the appropriate forum for

suits, it nevertheless defines a "self-executing remedial scheme" that provides a complete remedy "[w]ithout resort to the Tucker Act." *Bormes*, 133 S. Ct. at 18-19. The cause of action that the FLSA creates against employer defendants, both governmental and non-governmental, fits naturally within district courts' general Federal-question jurisdiction under 28 U.S.C. § 1331. The cause of action is, thus, fully available irrespective of the existence of the Tucker Act, and the Tucker Act is accordingly displaced. Because the Tucker Act is not available as a source of jurisdiction for plaintiffs' complaint, this Court does not possess jurisdiction to entertain plaintiffs' claims.

In other words, there is no dispute that the district courts possess jurisdiction to entertain claims under the FLSA. That jurisdiction is not obviated when the employer defendant is the United States. Because the district court possesses jurisdiction without resort to the Tucker Act, pursuant to *Bormes*, the Tucker Act does not apply to FLSA claims, and therefore, this Court does not possess jurisdiction over FLSA claims.

III. Transfer

Pursuant to 28 U.S.C. § 1631, "[w]henever a civil action is filed in a court ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action ... to any other such court in which the action ... could have been brought at the time it was filed." *See Jan's Helicopter Serv. v. FAA*, 525 F.3d 1299, 1303–04 (Fed. Cir. 2008); *Rodriguez v. United States*, 862 F.2d 1558, 1559–60 (Fed. Cir. 1988). At the time it was filed, plaintiffs' complaint could have been brought in multiple district courts. Accordingly, we respectfully request that the Court transfer plaintiffs' complaint.

DEFENDANT'S MOTION TO DISMISS

I. Rule 12(b)(6): Failure To State A Claim Upon Which Relief May Be Granted

"[A] complaint should be dismissed under RCFC 12(b)(6) 'when the facts asserted by the claimant do not entitle him to a legal remedy.'" *Steward v. United States*, 80 Fed. Cl. 540, 542-43 (2008) (quoting *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002)). When considering a motion to dismiss for failure to state a claim upon which relief may be granted, the Court "must accept as true all the factual allegations in the complaint, and [the Court] must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). *See also Huntleigh USA Corp.v. United States*, 63 Fed. Cl. 440, 443 (2005). The Court, however, is not required to "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Kowal v. MCI Commc'n Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citations omitted). Although the complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . ." *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

II. Plaintiffs Were Paid The Minimum And Overtime Wages For The Work That They Did During The Lapse In Appropriations And There Has Been No Violation Of The FLSA

Plaintiffs allege in Count One that members were not paid a minimum wage for Pay Period 19 on their "Scheduled Payday," AmComp. ¶¶52-55, and in Count Two that members were not paid their overtime pay for Pay Period 19 on their "Scheduled Payday." *Id.* at ¶¶ 56-60. Plaintiffs allege that the "Scheduled Payday" for all members was Friday, October 11, 2013,

Tuesday, October 15, 2013, or Thursday, October 17, 2013. *Id.* at ¶20. Plaintiffs do not make any representations as to **when** they were paid or the length of the alleged delay.

Plaintiffs fail to state a claim for a violation of the FLSA. First, Congress did not enact the FLSA to protect workers whose pay was delayed by a few days. Indeed, the Act was passed during the depression when workers were underpaid, and indeed, in many instances not paid at all. Moreover, there is no requirement in the Act, in any OPM regulations, or in case law in this circuit that requires the Government to pay its employees on a particular payday. Moreover, there is no statutory requirement providing that Federal employees must be paid on a particular payday. Even assuming that the pay for members who worked some or all of the days from October 1 through October 5, 2013, was delayed, we will demonstrate that any delayed payment by the Government was reasonable and in good faith so that imposition of liquidated damages is not warranted.

A. The Fair Labor Standards Act Was Enacted To Protect The Interests Of Low Wage Workers

Congress enacted the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, in the midst of the depression, in order to achieve certain minimum labor standards. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). "The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (citations omitted). "The principal congressional purpose in enacting the [FLSA] was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of

living necessary for health, efficiency and general well-being of workers.'" *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (citing 29 U.S.C. § 202(a)).

Congress extended the reach of the statute to Federal employees in 1974. Fair Labor Standards Act of 1974, Pub. L. 93-259, 88 Stat. 55 (1974). *See* 29 U.S.C. § 203(e)(2)(A). The legislative history of the 1974 Amendments reflects the original intent of the Act:

> The Act was a response to call upon a Nation's conscience, at a time when the challenge to our democracy was the tens of millions of citizens who were denied the greater part of what the very lowest standards of the day called the necessities of life; when millions of families in the midst of a great depression were trying to live on income so meager that the pall of family disaster hung over them day to day: When millions were denied education, recreation, and the opportunity to better their lot and the lot of their children; when millions lacked the means to buy the products of farm and factory and by their poverty denied work and productiveness to many other millions; and when one-third of a nation was ill housed, ill clad, and ill nourished.

H.R. Rep. No. 93-913 (1974), 1974 U.S.C.C.A. 2811, 2817.

Congress originally authorized the Department of Labor (DOL) to administer the FLSA for the private sector and the agency promulgated regulations to implement the Act. *See* 29 C.F.R. pt. 778. When Congress extended the FLSA to Federal employees in 1974, it authorized the Office of Personal Management (OPM) to administer the FLSA for Federal employees, instructing the agency to administer the Act in a manner consistent with the DOL's administration of the statute for the private sector. 29 U.S.C. § 204(f). *See Riggs v. United States*, 21 Cl. Ct. 664, 668 (1960). *See also* 5 C.F.R. § 551.101(c) ("OPM's administration of the Act must comply with the terms of the Act but the law does not require OPM's regulations to mirror the Department of Labor's FLSA regulations."). Thereafter, OPM promulgated implementing regulations. *See* 5 C.F.R. § 551.101-710.

Although the FLSA requires that every employer must pay his employees a minimum wage and overtime wages under certain circumstances, the Act does not define "prompt payment" or "timely payment" or "payday." Nor does the Act explicitly require that wages must be paid on a particular day. OPM has not promulgated a definition for "timely payment" or "prompt payment" or "scheduled payday."

The Act provides that an employer who violates the FLSA may be liable for liquidated damages, in an amount equal to unpaid minimum wages or unpaid overtime compensation. 29 U.S.C. §216(b). Liquidated damages are discretionary. Given the circumstances here, even if the Court were to find that defendant violated the FLSA, it should not award any liquidated damages.

B. There Is No FLSA Violation When Payment Of Minimum Wages Is Merely Delayed, As Was The Case Here

Congress did not include in the FLSA any requirement for payment of the minimum wage on a specific pay date. *See, e.g., Rogers v. City of Troy,* 148 F.3d 52, 55 (2d Cir. 1998) ("The Act does not specify *when* this wage must be paid.") The minimum wage provision of the Act states that "every employer shall pay for each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . ." 29 U.S.C. § 206. Likewise, the provision setting forth the overtime regulation does not contain any specific day by which overtime wages must be paid. *See generally* 29 U.S.C. § 207. In promulgating regulations to implement the FLSA for Federal workers, OPM did not specify a particular pay day that must be met or define "prompt payment" or "timely payment." Moreover, there is no Federal regulation that requires that Federal workers be paid on a specific date or even at specific intervals – weekly, bi-weekly, or even monthly.

This circuit has never held that a delay in payment of minimum or overtime wages is a violation of the FLSA.

Case law from other circuits finding a violation of the FLSA minimum or overtime wage provisions are primarily in the context of private employers when the violations have been egregious. Those cases have found a violation when an employer has substantially delayed payment, amounting to months or even years, or an employer clearly attempted to evade the Act.

For example, in *Brooklyn Savings Bank*, a night watchman who worked overtime frequently during his two year employment with the defendant bank was never paid for his overtime during his employment. *Brooklyn Sav. Bank,* 324 U.S. at 700-701. He was finally paid the overtime over two years after he left his employment with the bank, but only after he had signed a release indemnifying the bank of any liability for an FLSA violation. *Id.* The Supreme Court held that the waiver was invalid, and plaintiff was entitled to liquidated damages after the bank had retained his wages. *Id.* at 707 ("liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay . . .").

The Second Circuit, in *United States v. Klinghoffer Bros. Realty Corp.*, 285 F. 2d 487, 491 (2d Cir. 1960), affirming the criminal conviction of defendants for violating the FLSA, held that they violated the Act when they required plaintiffs to work additional overtime with the understanding that they would be paid for it at some indefinite time in the future. *Id.* at 491. The Court, finding that plaintiffs had not been paid for up to 17 months after they had performed the work, found that "[s]uch delayed payment does not meet the requirements of §207(a)." *Id.* The court also held that, although plaintiffs had an understanding that they would be paid eventually, "the statutory requirement of prompt compensation cannot be waived by agreement." *Id.*

In this case, plaintiffs allege a violation of the minimum and overtime wage provisions of the FLSA for some delay in payment of their wages. Unlike in *Brooklyn Savings Bank* and *Klinghoffer*, however, there are no allegations of lengthy delays, nor of any attempts by the Government to evade the provisions of the statute. The Government has not retained the wages of plaintiffs and members. Indeed, the Government paid federal employees who worked during the period at issue, October 1-5, 2013, as quickly as possible after the end of the budget impasse. Upon information and belief, plaintiffs in this case were paid their wages in full within one additional pay period of the period at issue – October 1-5, 2013. These circumstances are not the kind of delay or retention in wages that is contemplated in either *Brooklyn Savings Bank* or *Klinghoffer*.

The Seventh Circuit held that the defendant in *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993), violated the minimum wage provision of the FLSA when it failed to pay its farm workers their full pay each payday. At the end of the farm season, weeks and months later, defendant would pay the workers who remained on the job a "bonus" to bring their wages up to the minimum hourly wage required by the FLSA. *Id.* at 1107. The workers who left before the end of the season received no additional pay. *Id.* The court held, like the court in *Klinghoffer*, that even if the workers agreed to the withholding, defendant's actions violated the FLSA. *Id.* *See also Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1299 (3d Cir. 1991) (defendant paid plaintiffs less than minimum wage over several years and wilfully violated the FLSA). Unlike the case before this Court, these cases all involved substantial delays in payment to plaintiffs, were deliberate evasions of the requirements of the FLSA, and were egregious violations of labor standards, as contemplated by Congress.

At least one circuit has crafted a test to determine when payment after a scheduled payday is reasonable and, therefore, not a violation of the FLSA. In *Rogers v. City of Troy*, 148 F.3d 52 (2d Cir. 1998), police officers sued the city alleging that it had violated the minimum wage provision of the FLSA by gradually changing its pay schedule, and implementing a lagged biweekly payroll in place of the weekly one previously used. *Id.* at 54. The city was in the process of changing its old payroll system in which its civilian employees were paid on a given Friday for the work they performed the week prior to the one that was ending; while the police were paid every Friday for the work that they performed that week. *Id.* In implementing the new system, the city had delayed plaintiffs' pay by one day each week for five weeks. Once the week-long lag had been phased in, the switch to the biweekly pay system was complete and applied to both civilians and police. *Id.* Plaintiffs sought liquidated damages for each of the five weeks in which they were paid one additional day late while the new system was being phased in. *Id.* The Second Circuit held that an employer does not violate the FLSA (1) if it changes its payday for a legitimate purpose, (2) if there is no unreasonable delay in the payment of wages, (3) if the change is intended to be permanent, and, (4) if the change does not result in a substantive violation of the FLSA. *Id.* at 60. The court remanded the case for further proceedings consistent with its opinion. *Id.*

Although the facts here differ from those in *Rogers*, the case, and the test that the court devised there, is instructive. As in *Rogers*, the payday here was delayed a short time for a legitimate reason. The Government could not, without violating the Anti-Deficiency Act, 31 U.S.C. §1341(a), pay its employees during the lapse in appropriations. Moreover, the delay in payment was not an unreasonable delay. As in *Rogers*, the delay was for a valid reason, and the Court should not find any violation of the FLSA.

The case that is reasonably similar to the facts here is *Biggs v. Wilson*, 828 F. Supp. 774 (E.D. Ca. 1991), *aff'd*, 1 F.3d 1537 (9th Cir. 1993). In *Biggs*, state maintenance workers sued state officials for failing to pay them on their scheduled payday, due to an impasse in the California state budget that occurred in 1990. *Biggs*, 828 F. Supp. at 775. The state failed to pass a budget, state law prohibited the release of paychecks until a budget was passed, and state employees were paid 14-15 days late. *Id.* Although the trial court reasoned that employees must be paid on their regular payday, the court did not impose liquidated damages because plaintiffs sued the officers of the state and not the State, its employer. *Id.* at 779. Nevertheless, the court found that, even had the plaintiffs sued the State, the State had acted in good faith and had reasonable grounds to believe that its conduct complied with the Act "because neither statutes, the applicable regulations, nor the cases directly address the issue of prompt payment in the face of a state budget impasse." *Id.* The court did impose prejudgment interest. *Id*.

While finding that the state had not paid its employees on their payday, the trial court advised caution in applying the FLSA:

> The requirement of prompt payment should not be construed to impose strict liability on an employer for every delay in payment, however slight or for whatever reason. Indeed, such a result would threaten to bring about the financial ruin of many employers, seriously impair the capital resources of many others, provide a windfall to employees, and burden the court with excessive and needless litigation, all in direct contravention to the expressed intent of Congress. *See* 29 U.S.C. §251(a)(1), (4), and (7). Instead, it must be interpreted to require payment which is reasonably prompt under the totality of the circumstances in the individual case.

Id. at 777. A finding that payment was reasonably prompt under the totality of the circumstances, similar to the test established by the Second Circuit in *Rogers*, provides flexibility

for courts to review the circumstances and to determine whether those circumstances, like those in this case, reflect a good faith effort to comply with the FLSA. In this case, the Government was prohibited, by the Anti-Deficiency Act, from issuing pay checks to Federal employees for days worked during the period October 1-5, 2013, while appropriations had lapsed and the Government budget impasse remained unresolved. *See below* at 23-26. The Government acted reasonably under the circumstances, and the short delay in paying members for those days is not a violation of the FLSA.

No cases have held that payment of wages a certain number of days following the end of the pay period is a violation of the FLSA. *See Arroyave v. Rossi*, 296 Fed. App'x. 835, 837 (11th Cir. 2008), *Benavides v. Miami Atl. Airfreight, Inc.*, 612 F. Supp. 2d 1236, 1240 (S.D. Fla. 2008).

As each of the cases cited above establishes in the context of private employment, the FLSA contains no explicit requirement to pay the minimum or overtime wage on a particular or regular payday. OPM regulations do not require the Government to pay Federal employees on a particular day. No federal regulation requires the payment of Federal employees on any particular day or at any particular interval. The Government's delay in paying members was neither lengthy nor a deliberate attempt to evade the requirements of the FLSA. The Government respectfully requests that the Court find that the payments to members was well within the bounds of the FLSA, not the conduct contemplated by Congress in enacting the FLSA, and is not a violation of the Act. Counts One and Two must be dismissed for failure to state a claim.

C. Certain Plaintiffs Here Were Paid A Minimum Wage For The Two-Week Period At Issue

If the Court were not to dismiss all plaintiffs' complaint for failure to state a claim, FLSA nonexempt employees who were paid the Federal minimum wage for the work that they performed during the September 30, 2013 to October 5, 2013 work week, cannot state a claim for an FLSA violation.

Under the FLSA, the minimum wage for 2013 is $7.25 per hour. 29 U.S.C. § 206. To average at least $7.25 per hour over 40 hours, an employee must earn at least $290 in a work week ($7.25 times 40). Thus, any member in this case who was paid at least $580 ($290 times 2) in his biweekly check earned a minimum wage for the pay period at issue.

Thus, any Federal employee who earned $580.00 would have been paid the minimum wage for the hours worked over the period September 30, 2013 through October 5, 2013, and cannot state a claim for a violation of the minimum wage provision of the FLSA, and those claims must be dismissed.

D. Even If The Court Were To Find An FLSA Violation, No Grounds Exist For Awarding Liquidated Damages Because Defendant Acted Reasonably Under The Circumstances

Federal employees who worked during the lapse in appropriations were deemed essential by the Government. Their employment with the Government was necessary to protect the safety of human life and the protection of property. 31 U.S.C. §1342. Nevertheless, the Anti-Deficiency Act prohibited the Government from issuing to those employees pay for the period that they worked while the budget impasse continued. The employees continued to earn their wages, but payment was delayed. As such, any delay in payment to members of the collective action was excusable due to the Anti-Deficiency Act's prohibition.

The Anti-Deficiency Act provides in part that "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM v. Richmond*, 496 U.S. 414, 430 (1990) (citing 31 U.S.C. §§ 1341, 1350). The Act provides:

> An officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

31 U.S.C. § 1341(a)(1)(A). The Anti-Deficiency Act codifies three basic restrictions on the operations of government activities: (1) the Act implements the Appropriations Clause of the Constitution, U.S. Const. art. I § 9, cl. 7; (2) when no current appropriations measure has been enacted to fund contracts or obligations, it restricts entering into contracts or incurring obligations; and (3) it restricts employing the services of employees to perform the functions of Government except in authorized emergency situations. *See* Government Operations in the Event of A Lapse in Appropriations, Office of Legal Counsel, U.S. Dept. of Justice, 1995 WL 17216091 at *3 (Aug. 16, 1995). Thus, absent some other unrestricted source of budget authority, an agency's power to "make or authorize" payments from the Treasury expires when the relevant appropriations are exhausted. *See, e.g., Sutton v. United States*, 256 U.S. 575, 579-80 (1921); *Bradley v. United States*, 98 U.S. 104, 113-114, 117 (1878).

Notwithstanding the restrictions elucidated in the Act, the Anti-Deficiency Act, as amended in 1990, provides that under emergency circumstances Government personnel can be employed during a lapse in appropriations, but cannot be paid until appropriations are available:

> An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . . As

> used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1342. Under this provision of the Anti-Deficiency Act, the Act authorizes Federal officials "to employ personal services" that continue the functions incorporated within the emergency exceptions. In 1995, then-Assistant Attorney General Walter Dellinger testified before Congress regarding a potential lapse in appropriations then:

> It is important to note, however, that these employees may not receive an actual payment of money from the Treasury, unless and until an appropriation is enacted. During an extended lapse in appropriations, the nation would be depending upon the ability and willingness of prison guards, border officials, law enforcement agents, air traffic controllers, and others to continue working even though they would not be receiving pay checks.

Effects of Potential Government Shutdown: Joint Hearing Before the Sen. Budget Committee and H. Committee of the Budget, 104th Cong. 16 (Sept. 19, 1995) (statement of Walter Dellinger, Assistant Attorney General, United States Department of Justice). The Anti-Deficiency Act permits the employment of Federal employees during a lapse in appropriations but strictly prohibits the payment of Federal employees during a lapse in appropriations for any services they provide.

During the most recent lapse in appropriations, in October 2013, Federal agencies were required to employ certain of their employees in order to ensure the safety of human life and the protection of property, as provided in the Anti-Deficiency Act. 31 U.S.C. § 1342. These employees necessarily included prison guards, Federal air marshals, border patrols, and others. The Government, however, could not pay its employees for the period of the lapse in appropriations – October 1-5, 2013 – without violating the Anti-Deficiency Act, until the budget

impasse was resolved. This resulted in a short delay in paying those employees who worked for those four or five days.[2]

Even if the Court were to find that the Government violated the FLSA, the Court should exercise its discretion under the Act and find that liquidated damages should not be imposed. The Government had no choice but to require certain employees to work during the lapse in appropriations. Further, plaintiffs do not allege, nor can they, that they were not paid as quickly as possible once an appropriations bill was enacted in October. Thus, the Government acted reasonably and in good faith, first, in complying with the Anti-Deficiency Act, as it was unquestionably required to do, and second, in paying its employees who did work during the lapse as quickly as possible once appropriations were available. As such, plaintiffs have failed to state any grounds upon which this Court, even assuming a technical violation of the FLSA, may award to plaintiffs any liquidated damages.

III. Plaintiffs Have Failed To State A Cause Of Action For Failure To Pay Overtime To Non-Exempt Workers

Plaintiffs allege in Count Two that the Government failed to pay overtime to certain non-exempt members during Pay Period 19. AmComp. ¶¶ 56-60. Even if the Court were to find that it has jurisdiction, Count Two of the amended complaint fails to state a claim because no facts alleged in the complaint would allow the Court, assuming all allegations in the complaint to be true, to rule in plaintiffs' favor on a failure to pay overtime.

In order to survive a motion pursuant to RCFC 12(b)(6) to dismiss for failure to state a claim, "a plaintiff's obligation to provide the grounds for his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will

[2] Upon information and belief, all Federal employees were paid for those days a short time after they would ordinarily have been paid.

not do." *Twombly*, 550 U.S. at 555 (internal citations omitted, interpreting Fed. R. Civ. P. 12(b)(6)). A*ccord Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing *Twombly* and applying RCFC 12(b)(6) standard upon RCFC 12(c) motion). Plaintiffs' amended complaint does not survive an RCFC 12(b)(6) motion to dismiss, because it does not allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. *Twombly*, 550 U.S. at 557.

To state an overtime claim under the FLSA, plaintiffs must allege three elements: (1) compensable work that was unpaid; (2) uncompensated work in excess of 40 hours in a given week; and (3) status as employees of the defendant. *Lundy v. Catholic Health Sys. Of Long Island*, 711 F.3d 106, 113 (2d Cir. 2013). Plaintiffs allege in Count Two that "[m]any Members classified as non-exempt from the FLSA's overtime provisions worked in excess of the applicable threshold for overtime pay." AmComp. ¶58. Not one of the five original plaintiffs, however, has alleged that he worked in excess of the applicable threshold for overtime pay and was not compensated for it. *See generally* AmComp. ¶¶1, 6-10.

Plaintiffs have failed to allege any facts that would support a finding by this Court that the Government failed to pay overtime pay to anyone. In order to recover for an FLSA violation, a plaintiff must allege a single workweek in which he worked at least 40 hours and also worked uncompensated time in excess of 40 hours. *Lundy*, 711 F.3d at 114. "While a complaint is not required to contain detailed factual allegations, it must provide 'enough facts to state a claim for relief that is plausible on its face.'" *Meyers v. United States*, 96 Fed. Cl. 34, 60 (2010) (citing *Twombly*, 550 U.S. at 570). Plaintiffs must plead "factual content" that allows the Court to draw reasonable inferences that the defendant is liable for the misconduct alleged. *Meyers*, 96 Fed. Cl. at 60 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)). It is not enough for plaintiffs to make

broad generalized allegations in this regard. They must allege actual factual underpinnings upon which their complaint relies. Plaintiffs have failed to do that, and as such, they have failed to state a claim upon which any relief may be granted. Accordingly, Count Two of plaintiffs' amended complaint must be dismissed for failure to state a claim.

IV. Count Three Must Be Dismissed For Failure To State A Claim Because FLSA Exempt Employees Are Exempt From Provisions Of The FLSA

In Count Three, plaintiffs assert that the Government failed to pay members classified as FLSA exempt overtime pay on their "Scheduled Payday," in violation of the FLSA's overtime provision. AmComp. ¶¶61-66. Plaintiffs specifically allege that "[m]any FLSA Exempt Members worked in excess of the applicable threshold for overtime pay." *Id.* at ¶64. As factual support for their claim, plaintiffs further allege the legal conclusion that "[e]mployees are not exempt from payment of overtime under the managerial, professional or administrative exemptions unless, among other requirements, they are paid on a salary basis." *Id.* ¶39. Plaintiffs further assert that, because the Government allegedly did not pay plaintiffs on the "Scheduled Payday" for work they performed during the period October 1-5, 2013, that is "inconsistent with paying them on a salary basis." *Id.* ¶40. One of the original plaintiffs, Jose Rojas, alleged in the amended complaint that he was classified by the Government as FLSA exempt, but did not allege that he worked any overtime. AmComp. ¶9.

Just as Count Two must be dismissed for plaintiffs' failure to allege any facts that would support a finding by this Court that the Government has failed to pay FLSA exempt employees overtime, so too Count Three suffers from the same defects of pleading and must be dismissed. Moreover, plaintiffs also fail in Count Three to state a claim because FLSA exempt Federal employees are not subject to the minimum wage or overtime requirements under the FLSA. *See* 5 C.F.R. § 551.104. The relevant OPM regulations are clear: **"FLSA exempt means not**

covered by the minimum wage and overtime provisions of the Act." *Id.* FLSA exempt employees cannot bring a claim for a violation of the Fair Labor Standards Act.

Plaintiffs are mistaken in their understanding that the "salary basis" test brings them within the purview of the Act. *See* AmComp. ¶¶39-40. Resort to the "salary basis" test is unavailing because that test simply does not apply to Federal employees. *Billings v. United States*, 322 F.3d 1328, 1330 (Fed. Cir. 2003). Thus, plaintiffs' attempt to sweep FLSA exempt Federal employees under the FLSA umbrella by alleging in their amended complaint that the salary basis test applies fails.

In *Billings*, the Federal Circuit affirmed the trial court's dismissal of plaintiffs' complaint seeking overtime under the FLSA. *Id.* at 1330, 1335. Plaintiffs, employees of the United States Border Patrol, alleged that the Government improperly classified them within the executive exemption of the overtime provisions because they had not considered whether they were paid on a "salary basis." *Id.* at 1330. The *Billings* plaintiffs relied upon a Department of Labor regulation providing that, for a position to be deemed executive under its regulations, the employee must be paid on a salary basis. *See* 29 C.F.R. pt. 541. The trial court found that the plaintiffs were exempt employees under 29 U.S.C. § 213(a) and OPM regulation 5 C.F.R. § 555.204. The plaintiffs challenged the OPM regulations because they do not contain a salary-basis test for determining the exempt status of Federal employees, as the Labor Department's regulations that govern private employees do. *See* 5 C.F.R. § 555.204. The trial court rejected that argument and held that the OPM regulations were a reasonable interpretation of the FLSA for Federal employees. *Billings*, 322 F.3d at 1331.

The Federal Circuit also rejected plaintiffs' assertion, that the OPM regulations conflicted with the definition of "executive" under the Labor Department's regulations, and affirmed the

trial court's dismissal of plaintiffs' claim for overtime pay under the FLSA. *Id.* Although the Court agreed that OPM's regulations varied from the Labor Department's regulations, it determined that "the variance in OPM's regulation is no more than needed to accommodate the difference between private and public sector employment." *Id.* at 1334.

In this case, there is no dispute that some of the members are classified as FLSA exempt. As such, they are not eligible for overtime compensation under the FLSA or OPM regulations.[3] Plaintiffs' reference to the salary basis test in their amended complaint is irrelevant to any determination as to the application of the FLSA to exempt employees – indeed, as we have established, it is well-settled that FLSA exempt employees are not covered by the FLSA. Accordingly, Count Three of plaintiffs' amended complaint should be dismissed with prejudice.

V. Plaintiffs Cannot State A Claim For Prejudgment Interest Under the FLSA Or The Back Pay Act

If the Court were to find that plaintiffs have stated a cause of action for an FLSA violation, plaintiffs are not entitled to prejudgment interest. In the complaint, plaintiffs seek prejudgment interest upon "amounts owed," pursuant to the Back Pay Act, 5 U.S.C. § 5596. AmComp. ¶¶69, Prayer for Relief, (f). Because the United States has not waived sovereign immunity to be sued for interest for FLSA violations, plaintiffs are not entitled to interest under the Back Pay Act. The United States "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Statutory language giving the Government's consent to be sued must be strictly construed in favor of the sovereign, and the

[3] FLSA exempt federal employees are likewise not subject to the FLSA minimum wage provisions. *See* 5 C.F.R. § 551.104.

waiver of immunity cannot be expanded "beyond what the language requires." *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927).

This rule applies with particular force when a claim is made for interest against the United States. It is a longstanding rule that "interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress." *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986) (citation omitted). "Apart from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *Id.* at 317 (citation omitted).

It is settled that the FLSA itself does not provide for recovery of interest. *Doyle v. United States*, 931 F.2d 1546, 1550 (Fed. Cir. 1991); *Zumerling v. Marsh*, 783 F.2d 1032 (Fed. Cir. 1986). Nor does the Back Pay Act contain the clear and unequivocal waiver of immunity needed to support the award of prejudgment interest upon plaintiffs' recovery of damages under the FLSA. *Angelo v. United States*, 57 Fed. Cl. 100, 111 (2003) (finding Back Pay Act did not waive sovereign immunity because of FLSA's right to liquidated damages). Moreover, the comprehensive statutory scheme of the FLSA that provides a complete remedy, establishes the limits of the waiver of sovereign immunity. *Bormes*, 133 S. Ct. at 18.

The Back Pay Act does not authorize interest awards upon claims brought pursuant to the FLSA; it provides for interest upon only back pay awards made pursuant to the Back Pay Act itself. The Act states that "[a]n amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest." 5 U.S.C. § 5596(b)(2)(A) (emphasis added). It follows that Congress has waived the sovereign immunity of the United States as to interest upon only awards made pursuant to the Back Pay Act. In the case before the Court, plaintiffs seek damages pursuant to the FLSA's damages provision, 29 U.S.C. § 216(b), and if plaintiffs could prove

entitlement, any award would be pursuant to the FLSA, not the Back Pay Act. Thus, according to the plain language of the Back Pay Act, the Back Pay Act does not apply to this case because the award of damages in this case would not be made pursuant to 5 U.S.C. § 5596(b)(1)(A)(i).

Moreover, the structure of the FLSA confirms that Congress has not waived the Government's sovereign immunity against interest claims for violations of the FLSA. *Adams v. United States*, 48 Fed. Cl. 602, 609 (2001). The FLSA provides for the payment of liquidated damages. *See* 29 U.S.C. § 216(b). Liquidated damages, like prejudgment interest, compensate employees for the loss of the use of those monies that have been improperly withheld. *Adams*, 48 Fed. Cl. at 610 (citing *Brooklyn Savings Bank*, 324 U.S. 697 (1945)). Accordingly, courts have held that recovery of both liquidated damages and Back Pay Act interest is impermissible. *Id.* (citing cases). Congress also created an exception to the payment of liquidated damages for employers whose actions were in good faith and based upon reasonable grounds. *See* 29 U.S.C. § 260.

In enacting the FLSA, Congress opted to compensate Federal employees who had been improperly denied overtime pay for the loss of the use of wrongly withheld overtime pay through the provision of liquidated damages. Congress chose not to provide these aggrieved employees' interest upon these withheld monies. Consequently, the Back Pay Act does not provide an express waiver of sovereign immunity in the case before the Court.

VI. Plaintiffs Have Not Stated A Claim For A Violation Of The Back Pay Act

A. Plaintiffs Have Not Stated A Claim Of An Unjustified Or Unwarranted Personnel Action

Plaintiffs allege in Count Four of the amended complaint the legal conclusion that, among other things, they "suffered an unjustified personnel action in that they were forced to work without knowing if and when they would be paid, without being paid on their Scheduled

Pay Day for work performed during the Five Days." AmComp. ¶68. Count Four should be dismissed for failure to state a claim, first, because plaintiffs have failed to assert any facts that, taken as true, allege any unjustified or unwarranted personnel action. Moreover, any alleged delay in payment is not an unjustified or unwarranted personnel action or a withdrawal or reduction of all or part of their pay under the Back Pay Act. Accordingly, Count Four should be dismissed for failure to state a claim.

The Back Pay Act provides:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee-
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect-
>
> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.

5 U.S.C. § 5596(b).

To be entitled to relief under the Back Pay Act, a plaintiff must demonstrate that (1) an appropriate authority has found that he has suffered an unjustified or unwarranted personnel action, and (2) the action resulted in a withdrawal or reduction of all or part of the employee's pay, allowances, or differentials. *Donovan v. United States*, 580 F.2d 1203, 1206-07 (3d Cir. 1978). *See also* 5 C.F.R. §§ 550.803, 550.804. Before an action can be brought in this Court under the Back Pay Act, however, an "appropriate authority" must find that the employee was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or

reduction of all or part of his pay. 5 U.S.C. §5596(b)(1). Such an authority may include an agency or the Merit Systems Protection Board, but it does not include the Court of Federal Claims. *United States v. Fausto*, 484 U.S. 439, 454 (1988).

Moreover, the entitlement to "back wages" arises "on correction of the personnel action." A failure to pay, absent an underlying personnel action, cannot provide entitlement under the Back Pay Act. The legislative history of the Act identifies the types of personnel actions falling within its purview:

> H.R. 1647 does not prescribe the specific types of personnel actions covered. Separations, suspensions, and demotions constitute the great bulk of cases in which employees lose pay or allowances, but other unwarranted or unjustified action affecting pay or allowances could occur in the course of reassignments and change from full-time to part-time work. If such actions are found to be unwarranted or unjustified, employees would be entitled to backpay benefits when the actions are corrected.

S. Rep. No. 89-1062 at 3 (1966), 1966 U. S. C. C.A. N. 2097, 2099 (emphasis added).

The Supreme Court has found that the "statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and 'other unwarranted or unjustified actions affecting pay or allowances (that) could occur in the course of reassignments and change from full-time to part-time work.'" *United States v. Testan*, 424 U.S. 392, 405-06 (1976) (citing S. Rep.No. 89 - 1062, 1966 U. S. C. C.A. N. at 2099).

Courts have generally held that the Back Pay Act does not apply when the Government merely owes a party money. *See, e.g., Bell v. United States*, 23 Cl. Ct. 73, 77 (Cl. Ct. 1991) ("Mere failure by a government agency to pay money due is not the kind of adverse personnel action contemplated by the Back Pay Act."); *Garcia v. United States*, 996 F. Supp. 39, 43

(D.D.C. 1998) (when employee's claim is merely that Government owes him money, it is not an unwarranted personnel action).

Plaintiffs in this case assert that the delayed payment of their pay constituted a violation of the Back Pay Act. AmComp. ¶¶68-69. Plaintiffs have not alleged any unjustified or unwarranted action, nor has any appropriate authority found any such unjustified or unwarranted action. Payment to plaintiffs on a date other than what they consider to be their "Scheduled Pay Day" is not an unjustified or unwarranted personnel action. Nor have they alleged any withdrawal or reduction in their pay. Plaintiffs have failed to state a claim for a violation of the Back Pay Act and Count Four should be dismissed.

B. Even If The Court Were To Find A Back Pay Act Violation, No Remedy Is Available To Plaintiffs

Even if the Court were to find that there has been an unjustified or unwarranted personnel action, no damages are available to plaintiffs under the Back Pay Act. It is undisputed that plaintiffs have been paid for the work that they did on the days from October 1 – 5, 2013. The only possible remedy that could be available to plaintiffs would be interest. The calculation of interest upon a Back Pay Act award, however, begins 30 days after the back pay was alleged to have been withheld. 5 U.S.C. § 5596(b)(2)(B)(i). Plaintiffs fail to allege that they were not paid within 30 days of their routine payday, and therefore, no Back Pay interest could be owed to them.

The Back Pay Act provides that, in addition to pay that an employee would have received but for the unjustified or unwarranted personnel action, he may also receive interest on the amount payable. 5 U.S.C. § 5596(b)(2)(A). OPM's regulations regarding the computation of the interest payment provide first that,

> Interest begins to accrue on the date or dates (usually one or more pay dates) on which the employee would have received the pay, allowances, and differentials if the unjustified or unwarranted personnel action had not occurred.

5 C.F.R. § 550.806(a)(1). The regulations further provide that,

> No interest is payable if a complete back pay payment is made within 30 days after any erroneous withdrawal, reduction, or denial of a payment, and the interest accrual ending date is set to coincide with the interest accrual starting date.

5 C.F.R. § 550.806(a)(2). *See Cox v. U.S. Postal Serv.*, 87 M.S.P.R. 575, 577 (M.S.P.B. Feb. 14, 2001).

Plaintiffs allege that they did not receive pay for the period October 1, 2013, through October 5, 2013, on their "Scheduled Paydays" ranging from October 11, 2013, to October 17, 2013. Plaintiffs have not alleged, however, that they were paid outside of the 30 day window. Plaintiffs have, therefore, failed to state a claim for interest under the Back Pay Act.

Plaintiffs' claim for interest in Count Four pursuant to the Back Pay Act should be dismissed for failure to state a claim.

CONCLUSION

For these reasons, the Government respectfully requests that the Court transfer plaintiffs' complaints to the relevant district courts or, alternatively, dismiss plaintiffs' amended complaint for failure to state a claim.

Respectfully submitted,

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